TEH EOK KEE & ANOR.

v.

TAN CHIAH HOCK & ANOR.

FEDERAL COURT PENANG
TAN SRI DATO' EDGAR JOSEPH JR. FCJ
DATO' MOHAMED DZAIDDIN HJ. ABDULLAH FCJ
DATO' HJ. ABU MANSOR BIN ALI JCA
[CIVIL APPEAL NO. 02-149-94]
8 NOVEMBER 1995

LEGAL PROFESSION: *Advocates and solicitors - Agency - Solicitors concluding contract of sale and purchase of land on behalf of clients - Whether solicitors properly authorised to bind client to contract - Actual and ostensible authority - Scope - Whether defined by terms of retainer.*

EVIDENCE: *Hearsay - Exceptions to rule - Testimony in Court - Contents of testimony attributable to person not called as witness - Allegation admitted by opposite party - Whether admissible - Whether an exception to hearsay rule - Whether evidence also admissible to show state of mind of testifying witness - Admission - Out-of-Court admissions by co-parties in suit - Whether admissible - Evidence Act 1950 s. 14.*

EVIDENCE: *Hearsay - Statement by person in privity with parties to suit - Maker of statement not called as witness - Whether statement admissible - Whether statement made in capacity as agent of parties to suit - Whether caught by s. 18(1) Evidence Act 1950.*

The respondents were the co-proprietors of a piece of land situate in Seberang Perai Selatan (the land). By a letter dated 30 April 1990 the respondents gave an option to their brother, Tan Weng Hock (Tan) to sell the land at RM58,000 an acre. This option was signed by the second respondent. Tan succeeded in finding the purchasers (the appellants), and thereafter approached Mr C.P Ang (Ang) of the legal firm M/s. C.P Ang & Co. (Ang & Co.) to act for the respondents in the intended transaction. At about the same time, the appellants engaged their own solicitors by the name of M/s. Tan Boon Lin & Co., who later prepared the draft sale and purchase agreement and had it sent to Ang & Co., who in turn handed the same to Tan with a direction to convey the agreement to the respondents for their consent. Tan did just that, and later on one of the respondents called at Ang & Co. According to Ang, the respondent then told his clerk, one Rajaratnam, "to call for a fair copy of sale and purchase agreement and 10% of purchase price deposit" (first testimony). Rajaratnam, however, was not a witness at the hearing in the Court below.

After Ang & Co. received the engrossed copy of the agreement and the deposit from the appellants' solicitors, the respondents again called at Ang's office, apparently to sign the agreement. Ang testified that Rajaratnam had informed him that when the respondents were asked to settle the legal fees, they claimed that Tan was the proper person to do so and that they would not sign the agreement before sorting that out with Tan (second testimony). The respondents, however, gave a different version of what transpired, testifying that the question of fees then did not at all arise, and that they refused to sign the agreement because they were not aware of the matter in question.

On 18 June 1990, the respondents discharged Ang & Co. from acting on their behalf and thereafter requested that Ang & Co. hand over certain documents to their new solicitors M/s. Goik Ah Kim & Co. (Goik). At about this time, the respondents had also found a new purchaser who would pay a higher price for the land, and following that, on 17 August 1990, the respondents told Ang & Co., for the first time, that it was not authorised to act on their behalf even in the earlier transactions, and on that score refused to pay the legal fees due to the firm.

The appellants brought a suit for specific performance of the agreement but the same was dismissed by the trial Judge on the ground that in the circumstances, Ang & Co. did not have the authority to bind the respondents contractually in the matter of the sale and purchase of the land. The learned Judge also ruled as hearsay and therefore inadmissible both the first and second testimony of Ang. The appellants appealed and before the Supreme Court the primary issues that arose were (i) whether the respondents had authorized Ang & Co. to conclude a contract of sale and purchase in favour of the appellants (ii) whether it could be reasonably inferred from the evidence that the respondents had ratified the unauthorized bargain struck by Ang & Co.

Held:

Per Edgar Joseph Jr. FCJ (Mohamed Dzaiddin Abdullah FCJ & Abu Mansor Ali JCA concurring):

[1] A solicitor's authority flows from the retainer given to him by his client. It follows that his authority to act is limited by any special conditions imposed and supplemented by any special authority conferred by the retainer. Generally, a solicitor has no authority to bind his client contractually as a vendor or purchaser of land, unless such authority is expressly conferred upon him or is implicit in the terms of the retainer.

[2] It is a question of fact in each case, whether a solicitor has actual or ostensible authority to bind his client contractually. His authority is limited by his instructions, which is also a question of fact. The burden of proof of establishing such authority must rest on the party who alleged it.

[3] In the circumstances herein, notwithstanding that Rajaratnam was not called as a witness, it was wrong of the trial Judge to have ruled as hearsay and inadmissible both the first and second testimony of Ang. Bearing in mind the admission of the events by the respondents who were parties to the suit, the first testimony of Ang should have been admitted on the principle that if a party to a civil suit says he does not dispute the truth of a fact, the opposite party will not be required to prove such fact. The second testimony of Ang ought to be admissible under s. 14 of the Evidence Act 1950 as being relevant to show Ang's state of mind that he had reason to believe that he was authorised to conclude the contract on behalf of the respondents.

[4] On the available evidence, the Judge ought to have held that Tan, being the option holder, had the authority of the respondents to authorize Ang to act for them in the agreement. The scope of Tan's authority was spelt out in the option to sell, and although he was not a witness, the statements attributed to him were the statements in the nature of admissions, implied if not express, of one who was in privity with parties to the suit. It is clear law that not only admissions made personally by the party, but also admissions by those in privity with the party are admissible as exceptions to the hearsay rule. As evinced by s. 18(1) of the Evidence Act, those in privity include agents acting within the scope of their authority.

[5] In so far as proof that Tan was the agent of both the respondents was concerned, the case against the second respondent was stronger, because the option was only signed by the second respondent, and not the first respondent. However, having regard to the evidence of the surrounding circumstances herein, there was sufficient material, from which it could be inferred that Tan was the duly authorised agent for both the respondents for the purpose of selling the land, upon the terms stated in the option in writing. Also, this being the obtaining position, Tan's out-of-Court statements were admissible against both the respondents.

[6] On the evidence, the Judge should have, but did not ask himself, whether the entry on the scene of a new purchaser at a higher price might have been the factor which caused the respondents to renege on the agreement. In this respect, it is also obvious that the first defendant's testimony that he was not aware of "the first sale transaction" with the appellants when he made the second sale with the new purchaser, and engaged Goik, was tainted by a proven lie and that his credibility here was clearly wanting.

[7] The inaction and delay on the part of the respondents to challenge the authority of Ang & Co. to bind them contractually had also been overlooked by the Judge. Clearly, the delay was wholly inconsistent with the respondents' version of the facts. Further, it tended to show that even if Ang or Ang & Co. did not have prior authority to bind the respondents

contractually in the matter of the sale and purchase of the land, a case of ratification by acquiscence could certainly be drawn therefrom.

[8] The present appeal came within the range of those cases where, because the Judge had, in arriving at his findings of fact, either overlooked or failed to take into account or to give proper weight to material circumstances and the probabilities of the case, this Court is entitled to conclude that he had not taken proper advantage of his having seen and heard the witnesses with the result that his judgment cannot stand.

[Appeal allowed].

***[Bahasa Malaysia** Translation of Headnotes]*

***PROFESYEN UNDANG-UNDANG:** Peguambela & Peguamcara - Agensi - Peguamcara membuat kontrak jual beli tanah bagi pihak anak guam - Samada peguamcara diberi kuasa dengan betul untuk mengikat anak guam kepada kontrak - Kuasa zahir dan sebenar - Bidang - Samada dihadkan oleh syarat-syarat retainer.*

***KETERANGAN:** Dengarcakap - Kecualian kepada aturan - Testimoni dalam Mahkamah - Kandungan testimoni dihubungkan kepada orang yang tidak dipanggil sebagai saksi - Pengataan diakui oleh pihak bertentangan - Samada boleh diterima - Samada satu kekecualian kepada aturan dengarcakap - Samada keterangan boleh diterima bagi menunjukkan keadaan fikiran saksi yang memberi keterangan - Pengakuan - Pengakuan-pengakuan luar-Mahkamah oleh pihak bersama dalam guaman - Samada boleh diterimamasuk - Akta Keterangan 1950 s. 14.*

***KETERANGAN:** Dengarcakap - Pernyataan oleh orang dalam priviti dengan pihak-pihak kepada guaman - Pembuat pernyataan tidak dipanggil sebagai saksi - Samada pernyataan boleh diterimamasuk - Samada pernyataan dibuat dalam kedudukan sebagai ejen kepada pihak-pihak dalam guaman - Samada dirangkumi oleh s. 18(1) Akta Keterangan 1950.*

Kedua-dua responden adalah tuan punya bersama sebidang tanah yang terletak di Seberang Perai Selatan (tanah tersebut). Melalui surat bertarikh 30 April 1990 responden telah memberi satu opsyen kepada saudara lelaki mereka, Tan Weng Hock (Tan) untuk menjual tanah tersebut pada harga RM58,000 seekar. Opsyen ini ditandatangani oleh responden kedua. Tan berjaya mencari pembeli-pembeli (perayu), dan selepas itu telah menjumpai Encik C.P. Ang (Ang) dari firma guaman Tetuan C.P. Ang & Co. (Ang & Co.) untuk mewakili responden dalam urusan yang dicadangkan itu. Lebih kurang pada masa yang sama, perayu telah melantik peguamcara mereka sendiri bernama Tetuan Tan Boon Lin & Co., firma guaman mana, kemudiannya, telah menyediakan draf perjanjian jualbeli dan mengirimkannya kepada Ang & Co. yang menyerahkan pula

dokumen tersebut kepada Tan dengan arahan supaya disampaikan perjanjian itu kepada responden untuk persetujuan mereka. Tan telah melakukan apa yang diarah, dan kemudiannya salah seorang dari responden telah datang ke pejabat Ang & Co. Menurut Ang, di pejabatnya responden tersebut memberitahu keraninya, seorang yang bernama Rajaratnam, supaya "meminta sesalinan perjanjian jualbeli dan 10% deposit harga belian" (testimoni pertama). Rajaratnam, namun begitu, bukanlah seorang saksi di perbicaraan dalam Mahkamah di bawah.

Selepas Ang & Co. menerima salinan perjanjian jual beli serta deposit dari peguamcara perayu, responden telah sekali lagi pergi ke pejabat Ang bertujuan untuk menandatangani perjanjian tersebut. Ang memberi keterangan bahawa Rajaratnam telah memaklumkan kepadanya bahawa apabila responden diminta untuk menjelaskan fee guamannya, mereka mendakwa bahawa Tan adalah orang yang wajar untuk membuat pembayaran tersebut dan bahawa mereka tidak akan menandatangani perjanjian tersebut sebelum menyelesaikan hal itu dengan Tan (testimoni kedua). Responden, bagaimanapun, memberi penjelasan yang berbeza mengenai apa yang berlaku, dan memberi keterangan bahawa persoalan fee ketika itu tidak berbangkit sama sekali dan bahawa mereka enggan untuk menandatangani perjanjian tersebut kerana mereka tidak mengetahui mengenai perkara yang dipersoalkan itu.

Pada 18 Jun 1990, responden telah melepaskan Ang & Co. daripada bertindak bagi pihak mereka dan memintanya menyerahkan dokumen-dokumen tertentu kepada peguamcara baru mereka Tetuan Goik Ah Kim & Co. (Goik). Lebih kurang pada waktu yang sama, responden juga telah mendapatkan pembeli baru tanah tersebut, yang bersedia untuk membayar harga yang lebih tinggi, dan berikutan itu, pada 17 Ogos 1990, responden telah memberitahu Ang & Co., buat pertama kalinya, bahawa ianya telah tidak diberi kuasa untuk bertindak bagi pihak mereka walaupun dalam urusan-urusan yang lebih awal, dan atas alasan itu, telah enggan untuk membayar fee guaman yang kena dibayar kepada firma tersebut.

Perayu telah memulakan satu guaman untuk perlaksanaan spesifik perjanjian jual beli di atas, tetapi ianya telah ditolak oleh Hakim perbicaraan atas alasan bahawa Ang & Co., dalam keadaan yang wujud, tidak diberi kuasa untuk mengikat responden secara kontraktual dalam perkara penjualan serta pembelian tanah tersebut. Hakim perbicaraan telah juga memutuskan sebagai keterangan dengarcakap, dan oleh sebab itu tidak menerimamasuk, kedua-dua testimoni Ang. Perayu telah merayu dan di hadapan Mahkamah Agung isu utama yang berbangkit adalah (i) samada responden telah memberi kuasa kepada Ang & Co. untuk memeterai satu kontrak jualan dan belian atas nama perayu (ii) samada berdasarkan keterangan kesimpulan secara wajarnya boleh dibuat bahawa responden telah mengesahkan kontrak yang telah dibuat oleh Ang & Co.

Diputuskan:

Oleh Edgar Joseph Jr., HMR (Mohamed Dzaiddin Abdullah HMP & Abu Mansor Ali HMR menyetujui):

[1] Kuasa seseorang peguamcara berpunca daripada retainer yang diberikan kepadanya oleh anak guamnya. Adalah didapati bahawa kuasanya untuk bertindak adalah terhad oleh mana-mana syarat khas yang dikenakan dan ditambah oleh mana-mana kuasa khas yang diberikan oleh retainer tersebut. Secara amnya, seseorang peguamcara tidak mempunyai kuasa untuk mengikat anak guamnya secara kontraktual sebagai penjual atau pun pembeli tanah, kecuali kuasa yang sedemikian diberikan dengan khusus kepadanya atau tersirat dalam syarat-syarat retainer.

[2] Ianya merupakan persoalan fakta dalam setiap satu kes, samada seseorang peguamcara mempunyai kuasa yang sebenarnya atau yang tersembunyi bagi mengikat anak guamnya secara kontraktual. Kuasanya adalah terhad oleh arahan-arahan anakguamnya, yang mana adalah merupakan persoalan fakta juga. Beban membukti bagi menentukan kuasa yang sedemikian haruslah terletak pada pihak yang mendakwanya.

[3] Dalam keadaan di sini, walaupun Rajaratnam tidak dipanggil sebagai saksi, ianya adalah salah bagi Hakim perbicaraan untuk memutuskan testimoni pertama dan kedua Ang sebagai dengarcakap dan tidak boleh diterima. Mengambil kira pengakuan peristiwa-peristiwa itu oleh responden, yang merupakan pihak-pihak kepada guaman tersebut, testimoni pertama Ang seharusnya diterimamasuk berdasarkan prinsip bahawa jika sesuatu pihak kepada guaman sivil mengatakan bahawa beliau tidak mempertikaikan kebenaran sesuatu fakta, tiada keperluan bagi pihak yang berlawanan untuk membuktikan fakta sedemikian. Testimoni kedua Ang sepatutnya diterima di bawah s.14 Akta Keterangan 1950 sebagai relevan bagi menunjukkan kedudukan fikiran Ang bahawa beliau mempunyai alasan untuk mempercayai bahawa beliau telah diberi kuasa untuk membuat kontrak itu bagi pihak responden.

[4] Berdasarkan keterangan yang ada, Hakim sepatutnya memutuskan bahawa Tan, yang merupakan pemegang opsyen, mempunyai kuasa daripada responden yang membenarkan Ang untuk bertindak bagi pihak mereka dalam perjanjian tersebut. Bidang kuasa Tan untuk menjual jelas terdapat dalam opsyen tersebut, dan walaupun beliau bukan merupakan seorang saksi, pernyataan-pernyataan yang dihubungkan kepadanya adalah pernyataan-pernyataan yang bersifat pengakuan yang dibuat oleh seseorang, yang secara tersirat jika pun tidak secara nyata, adalah dalam priviti kepada pihak-pihak dalam guaman tersebut. Ianya merupakan undang-undang yang jelas bahawa bukan sahaja pengakuan-pengakuan yang dibuat sendiri oleh pihak-pihak dalam guaman, tetapi juga pengakuan-pengakuan yang dibuat oleh mereka yang dalam priviti dengan pihak tersebut adalah

boleh diterima sebagai pengecualian kepada kaedah khabar angin. Sepertimana yang ditunjukkan oleh s. 18(1) Akta Keterangan, mereka yang dalam priviti termasuk ejen yang bertindak dalam bidang kuasa mereka.

[5] Setakat yang bersangkutan dengan bukti bahawa Tan merupakan ejen bagi kedua-dua responden, kes terhadap responden kedua adalah lebih kukuh, kerana opsyen tersebut ditandatangani olehnya dan bukan oleh responden pertama. Walaubagaimanapun, memandangkan keterangan keadaan di sini, terdapat bahan yang secukupnya, daripada mana kesimpulan boleh dibuat bahawa Tan merupakan ejen bagi kedua-dua responden yang telah diberi kebenaran bagi tujuan menjual tanah tersebut, atas terma-terma yang dinyatakan dalam opsyen tersebut secara bertulis. Juga, memandangkan inilah kedudukannya yang wujud, pernyataan luar-Mahkamah Tan boleh diterima terhadap kedua-dua responden.

[6] Berdasarkan keterangan tersebut, Hakim seharusnya telah, tetapi tidak menanyakan dirinya, samada dengan kemasukkan pembeli baru dengan harga yang lebih tinggi mungkin telah menjadi faktor yang telah menyebabkan responden memungkiri perjanjian itu. Sehubungan dengan ini, ianya juga jelas bahawa testimoni responden pertama bahawa beliau tidak mengetahui mengenai "transaksi jualan yang pertama" dengan perayu ketika beliau membuat penjualan yang kedua dengan pembeli yang baru itu, dan melantik Goik, adalah tercemar oleh pembohongan yang terbukti, dan bahawa kebolehpercayaannya disini boleh diragui.

[7] Kelewatan dan kelembapan responden untuk mencabar kuasa Ang & Co. untuk mengikat mereka secara kontraktual telah juga tidak diendahkan oleh Hakim. Adalah jelas bahawa kelewatan tersebut adalah tidak konsisten dengan pandangan responden mengenai fakta tersebut. Kelewatan ini juga menunjukkan bahawa walaupun jika Ang atau Ang & Co. tidak mempunyai kebenaran atau kuasa terdahulu untuk mengikat responden secara kontraktual dalam perkara pembelian dan penjualan tanah tersebut, suatu kes ratifikasi melalui persetujuan tentunya boleh dihasilkan daripadanya.

[8] Rayuan semasa ini termasuk dalam rangkaian kes-kes di mana, oleh kerana Hakim, dalam mencapai keputusannya mengenai fakta-fakta, telah tertinggal atau gagal mengambil perhatian atau memberikan penekanan yang wajar kepada keadaan-keadaan penting, dan kebarangkalian kes, maka Mahkamah ini berhak memutuskan bahawa beliau telah tidak mengambil manafaat dari kelebihan melihat dan mendengar saksi-saksi dengan wajarnya, kegagalan mana telah mengakibatkan penghakimannya itu tidak dapat dipertahankan.

[Rayuan dibenarkan]

Cases referred to:
Khoo Sit Hoh v. Lim Thean Tong [1912] AC 323 ***(foll)***
Benmax v. Austin Motors Co. Ltd. [1955] AC 370 ***(foll)***
Sundram a/l Ramasamy v. Arujunan a/l Arumugam & Anor. [1994] 4 CLJ 300, [1994] 3 MLJ 361 ***(foll)***
Re Storer [1884] 26 Ch. D 189 ***(refd)***
Lockett v. Norman-Wright [1925] Ch. 56, 62 ***(refd)***
D'Silva v. Lister House Development Ltd. [1970] 1 AER 858, 866 ***(refd)***
Gavaghan v. Edwards [1961] 2 QB 220 ***(refd)***
Brogden & Others v. Metropolitan Rly Co. [1887] 2 AC 666 ***(refd)***
Bowen v. D'Orleans (Duc) [1900] 16 TLR 266 ***(refd)***
Nash v. O' Donnell [1927] NZLR 192 ***(refd)***
Rutherford v. Rutherford [1923] AC 1 HL ***(refd)***
Blatt v. Sweet [1923] 2 Ch. 314 ***(refd)***
Maclean v. Dunn [1928] 1 Mod. 761 ***(refd)***
Soames v. Spencer [1822] 1 Dow. & Ry 32 ***(refd)***
Wall v. Cockerell [1863] 10 HL Cas. 229 ***(refd)***
Morison v. London County and Westminister Bank Ltd. [1914] 3 KB 356 CA ***(refd)***
Watt v. Thomas [1947] AC 484

Legislation referred to:
Evidence Act 1950, ss. 14, 18(1)

Other sources referred to:
Halsbury's Laws of England, 4th Edn., Vol. 1, pp. 39, 458, paras 53, 767

For the appellants - Karin Lim, M/s. Lim Leng Han & Co.
For the respondents - Kueh Yeow Jee (Lau Kok Guan with him); M/s. Lau Kok Guan & Partners.

JUDGMENT

Edgar Joseph Jr. FCJ:

The issues in the action, which led up to this appeal, may be summarised thus: (1) Did the respondents to this appeal who are both brothers and the registered proprietors of certain land comprised in Lot 532, Mukim 7, Daerah Seberang Perai Selatan, in area 4 acres 3 roods 0.5 poles ("the land") authorise M/s. CP Ang & Co., advocates and solicitors, to conclude a contract of sale and purchase, in respect of the same, on behalf of the respondents and in favour of the appellants who are also both brothers? (2) If not, whether it could be reasonably inferred, from the evidence of the surrounding circumstances, that the respondents had ratified the unauthorised bargain struck by M/s. CP Ang & Co.?

In the Court below, the Judge answered the first question in favour of the respondents and dismissed the appellants suit for specific performance of the contract of sale and purchase of the land. However, he did not answer the second question. From the whole of that decision the present appeal has been brought.

It would be more convenient if I were to refer to the appellants, as the first and second plaintiffs, and the respondents, as the first and second defendants, respectively, unless the context otherwise requires.

Before us, the whole of the material evidence was carefully examined and it is therefore unnecessary to discuss it again at any length.

Suffice it to say, that it is a question of fact in each case, whether a solicitor has actual or ostensible authority, to bind his client contractually. His authority is limited by his instructions - also a question of fact - and the burden of proof of establishing such authority, in common with all cases of agency, must rest on the party alleging the agency.

Clearly, therefore, this was an appeal against findings of fact which turned, to some extent, upon the credibility of the parties and their witnesses and also on inferences to be drawn from the primary facts.

I was therefore mindful of the principles enunciated by their Lordships of the Judicial Committee of the Privy Council as long ago as 1912 in *Khoo Sit Hoh v. Lim Thean Tong* [1912] AC 323, and *Benmax v. Austin Motors Co. Ltd.* [1955] AC 370, applied by the majority in *Sundram a/l Ramasamy v. Arujunan a/l Arumugam & Anor.* [1994] 3 MLJ 361.

In *Khoo Sit Hoh*, their Lordships said this (at p. 325, para. 2):

> The case was tried before the Judge alone; it turned entirely on questions of fact, and there was plain perjury on one side or the other. Their Lordships' Board are therefore called upon, as were also the Court of Appeal, to express an opinion on the credibility of conflicting witnesses whom they have not seen, heard, or questioned. In coming to a conclusion on such an issue their Lordships must of necessity be greatly influenced by the opinion of the learned trial Judge, whose judgment is itself under review. He sees the demeanour of the witnesses, and can estimate their intelligence, position, and character in a way not open to the Courts who deal with later stages of the case. Moreover, in cases like the present, where those Courts have only his note of the evidence to work upon, there are many points which, owing to the brevity of the note, may appear to have been imperfectly or ambiguously dealt with in the evidence, and yet were elucidated to the Judge's satisfaction at the trial, either by his own questions or by the explanations of Counsel given in presence of the parties. Of course, it may be that in deciding between witnesses he has clearly failed on some point to take account of particular circumstances or probabilities material to an estimate of the evidence, or has given credence to testimony, perhaps plausibly put forward, which turns out on more careful analysis to be substantially inconsistent with itself, or with indisputable fact, but except in rare cases of that character, cases which are susceptible of being dealt with wholly by argument, a Court of Appeal will hesitate long before it disturbs the findings of a trial Judge based on verbal testimony.

In *Sundram*, when speaking for the majority of the Supreme Court, I had said this (at p. 373 F to H):

> ... We recognise, as we must, that a Court of Appeal, will naturally be reluctant to interfere with a finding of fact by the trial Judge who has had the inestimable advantage of watching the demeanour of the witnesses, 'their candour or their partisanship, and all the incidental elements so difficult to describe which make up the atmosphere of an actual trial' (Per Lord Macmillan in *Watt v. Thomas* [1947] AC 484, at 490-1). But, having said that, we would draw attention to the familiar principle that there is a distinction between the finding of a specific fact and the finding of a fact which is really an inference drawn from the facts specifically found. In the latter case - and the present case is such a case - the Appellate Court will be far more ready to reverse his decision founded as it is on inferences drawn from admitted or undisputed facts. (See *Benmax v. Austin Motors Co. Ltd.* [1955] AC 370).

It was with the above principles in mind that I approached the questions for decision in this appeal.

The ground upon which the Judge in the Court below had dismissed the plaintiff purchasers' suit for specific performance was that the legal firm of M/s. CP Ang & Co. did not have the authority to bind the defendant owners contractually in the matter of the sale and purchase of the land.

Now, a solicitor's authority flows from the retainer given to him by his client. It follows that his authority to act is limited by any special conditions imposed and supplemented by any special authority conferred by the retainer (*Re Storer* [1884] 26 Ch. D 189).

Generally, a solicitor has no general authority to bind his client contractually as a proposing vendor or purchaser of land unless such authority is expressly conferred upon him or is implicit in the terms of the retainer. If any authority is needed for this proposition then I need no more than refer to the cases of *Lockett v. Norman-Wright* [1925] Ch. 56, 62 and *D'Silva v. Lister House Development Ltd.* [1970] 1 AER 858, 866.

Another case to which I should like to refer, in this context, is *Gavaghan v. Edwards* [1961] 2 QB 220, where a proposing purchaser refused to complete and the vendor sued the purchaser for damages for breach of contract, and the question was whether there was a memorandum of the contract as required by s. 40 of the Law of Property Act, 1925, (no local equivalent, but does not affect the point at issue here), Dankwerts LJ delivering the judgment of the Court of Appeal in England said this:

> Now, it is no doubt correct (and there are cases which so hold) that the mere fact of the relationship of solicitor and client being constituted in regard to a particular purchase does not by implication give a solicitor any authority to make a contract or to sign a memorandum, and I may refer to *Forster v. Rowland* [1861] 7 H. & N. 103 and *Smith v. Webster* [1876] 3 Ch. D 49, CA. But that is not

> a hard and fast rule which is not capable of alternation. On the facts of the case, as it seems to me, from the way in which the instructions are given to the solicitor, he may by implication be entitled to sign a memorandum which will bind his client.

There is also authority for saying that when a solicitor is employed to approve of or settle the draft form of an agreement (*Brogden and Others v. Metropolitan Rly Co.* [1887] 2 AC 666) or to put it in shape (*Bowen v. D'Orleans (Duc)* [1900] [16 TLR 266), and he writes the word "approved" at the end of the draft, it is an approval of the mere form of the draft and not its substance. On the other hand, where a solicitor has been authorised to receive the purchase price and complete the transaction he is thereby authorised to approve of the transfer, and the solicitor's letter accompanying the same, bearing his signature, will constitute an authorised signature. (See *Nash v. O'Donnell* [1927] NZLR 192.)

In the Court of trial, Mr. CP Ang ("Ang"), advocate and solicitor and the sole proprietor of the legal firm of M/s. CP Ang & Co., was called as a witness for the plaintiffs.

By way of preliminary, Ang testified, without serious challenge, as follows:

> Prior to 18 April 1990 brother of defendants Tan Weng Hock came to my office with 2 plaintiffs. They said they were interested in the land. I asked the brother on what authority he was acting for the defendants. He said the defendants had given or is about to give him an option for the sale of the land. Tan Weng Hock told me that the defendants were either living in JB or KL. It was inconvenient for them to come to Penang.

Perhaps, appreciating that it would be most unwise for him to act for both the purchasers and the vendors in the matter of the proposed sale and purchase transaction, he added:

> I told plaintiff (purchasers) to go to their lawyer - i.e. Tan Boon Lin.

Similary, Ang also recognised the importance of his receiving direct instructions from the defendants, for he added:

> I told the parties I must see the defendants personally or that they must convey instruction directly to my office.

Ang further testified that he did see an option to sell the land signed by the second defendant only, though not by the first defendant, made out in favour of Tan Weng Hock, and produced by the latter. That there was such an option, at the material time, was common ground, and indeed, such an option was tendered in evidence and read as follows:

30 April 1990

Tan Weng Hock,
No: 672, Sungei Kecil,
Nibong Tebal.

Option Of Sale

In consideration of the sum of RM1, we hereby grant the option of sale of property relating to Lot 532, Mukim 7, SPS at RM58,000 - per acre.

We further agreed to give you 2% of the purchase price as commission upon the successful completion of the sale of the aforesaid property.

1. Tan Chiah Hock
...

2. Tan Chin Hock

Sgd.
...

(both of No: 672, Sungei Kecil, Nibong Tebal, SPS).

Subsequently, Ang testified that he had communicated with the solicitors for the plaintiffs purchasers "to tell his client to go and discuss the terms and if they agree to prepare and send the draft sale and purchase agreement to me".

Later, the draft sale and purchase agreement prepared by M/s. Tan Boon Lin & Co., the solicitors for the plaintiffs, did reach the hands of Ang who then passed it on to Tan Weng Hock when the latter called at his office with a direction "to convey the whole agreement to the defendants for their agreement".

Still later, Ang testified - and this was **admitted** by the defendants - that

> One of the two defendants called on my conveyancing clerk, S. Rajaratnam. He told my clerk **to call for a fair copy of Sale and Purchase Agreement and 10% of purchase price as deposit.** They said as they were coming from far away **they wanted to see the fair copy of the agreement and the 10% deposit.** (Emphasis provided).

The Judge considered that this part of the testimony of Ang was hearsay and therefore inadmissible as S. Rajaratnam was not called as a witness. With respect, having regard to the **admission** of these events by the defendants who were parties to the suit, this part of the testimony of Ang should have been admitted on the principle that if a party to a civil suit says he does not dispute the truth of a fact the Court will naturally not require the opposite party to prove such fact.

It is also noteworthy that the contemporary correspondence was consistent with Ang's version for, by a letter dated 15 May 1990, M/s. CP Ang & Co. wrote to M/s. Tan Boon Lin & Co. as follows:

> Your Ref: TBL/PT/60/90 Date: 15 May 1990
> Our Ref: CPA/CON/103/90
> M/s. Tan Boon Lin & Co.,
> Advocates & Solicitors,
> No. 63, Jalan Aston,
> 1st Floor,
> 14000 Bukit Mertajam.
>
> Dear Sirs,
>
> **Re: Lot No. 532, Mukim 7, Seberang Perai Selatan**
>
> We refer to your letter dated 25 April 1990 and return herewith the proposed copy of the Sale and Purchase Agreement for your further action.
>
> Kindly let us have the fair copy of the same together with the sum of Ringgit Twenty Nine Thousand One Hundred and Sixty Five and cents Sixty Two (RM29,162.62) being 10% deposit of the purchase price of the above property.
>
> Thank you.
>
> Yours faithfully,
>
> Sgd.

In response to that letter, M/s. Tan Boon Lin & Co. did send to M/s. CP Ang & Co., not only the engrossed copy of the sale and purchase agreement but also the 10% deposit by way of a bank draft which was duly paid into the latter's clients' account at the bank. Furthermore, Ang had custody of the issue document of title, at the material time, a cogent fact, which was wholly consistent - given the circumstances - with his having been duly authorised to bind the defendants contractually.

Be that as it may, the defendants did, after M/s. CP Ang & Co. had received the engrossed copy of the sale and purchase agreement and the 10% deposit, call at the latter's office - that much was admitted by the defendants. There was, however, an acute conflict of evidence, as to what had transpired there.

According to Ang, who freely admitted that he did not personally see the defendants or either of them - when asked to settle his professional fees, they claimed that their brother Tan Weng Hock - who was the option holder - should do so. They added that they would go back and consult Tan Weng Hock to sort this matter out before they signed the sale and purchase agreement. These facts were apparently conveyed to Ang by his conveyancing clerk S. Rajaratnam who, it will be recalled, was not called as a witness. In my view, evidence of these statements allegedly made by S. Rajaratnam to

Ang was admissible evidence of the state of mind of Ang; the statements being relevant to show that Ang had reason to believe that he was authorised to conclude the contract of sale and purchase on behalf of the defendants. (See s. 14, Evidence Act 1950). As stated in 17 *Halsbury's Laws of England*, 4th Edn., p. 39, para 53:

> Hearsay evidence in its legal sense is evidence given by a testifying witness of a statement made on some other occasion, when it is intended as evidence of the truth of what was asserted. It is essential to appreciate that evidence is only hearsay when tendered to prove the truth of the facts asserted, not when tendered simply to show that the statement was made.

The Judge was, therefore, wrong in disregarding evidence of these statements by the clerk S. Rajaratnam to Ang.

On the other hand, the defendant whilst admitting that they did call at the office of M/s. CP Ang & Co., on this occasion, went on to give a diferrent version of what had transpired there. According to them, Ang did not ask for his fees, on that occasion, and they did not sign the sale and purchase agreement because they did not know anything about it. However, despite the gravity of the matter, neither defendant wrote any letter to M/s. CP Ang & Co. to say so. Instead, the undisputed events which followed were wholly inconsistent with their case and it is to these events which I must now refer.

A month passed, without incident, when according to Ang - and on this he was not challenged - Tan Weng Hock called at his office to say that the defendants suspected him (Tan Weng Hock) of making "a big undercounter profit" and refused to sign.

Significantly, it was not until 18 June 1990, that the defendants wrote directly to M/s. CP Ang & Co. discharging them from acting for them with no mention made of his lack of authority to bind them contractually. That letter was in the following terms:

A.R. Registered

1. Tan Chiah Hock,
2. Tan Chin Hock,
96-3 Block-B, Bagan Sri Lempah,
Lorong Jugra, Batu 31/2
Jalan Kelang Lama,
58100 Kuala Lumpur.

18 June 1990

Tetuan CP Ang & Co.,
Advocates & Solicitors,
No. 18, Jalan Kg. Bengali,
12000 Butterworth.

Dear Sir,

Re: Lot 532 Mk. 7. SPS

We write to inform you that we have appointed Tetuan Goik Ah Kim & Co., of No. 1668 (1st Floor) Jalan Atas, 14300 Nibong Tebal, Seberang Perai Selatan to be our solicitors who would be in charge on all matters pertaining to the above property. We understand that you are now having custody of the Advanced Certificate of Title, and in the circumstances, we appreciate if you can kindly hand over the issue document of title to Tetuan Goik Ah Kim & Co., as soon as possible.

Yours faithfully,

1. sgd.
2. sgd.

c.c.

Messrs. Goik Ah Kim & Co.,
Advocates & Solicitors,
1668 (1st Floor) Jalan Atas,
143000 Nibong Tebal,
Seberang Perai Selatan

Please take further action on this matter.

One may well ask, if there had been any substance in the defendants' complaint that they had not engaged M/s. CP Ang & Co. to act for them in the matter of the sale and purchase of the land to the plaintiffs, why then was it necessary to discharge M/s. CP Ang & Co. from doing so?

It was not until 17 August 1990, that the second defendant wrote to M/s. CP Ang & Co. refusing to pay their bill for professional services rendered in the matter of the sale and purchase transaction on the ground that they were not authorised to act on behalf of himself and the first defendant. That letter was in the following terms:

Tan Chin Hock,
96-3, Blk. B,
Bangunan Sri Lempah,
Lorong Jugra,
Batu31/2, Jalan Klang Lama,
58100 Kuala Lumpur.

Date: 17 August 1990

Your ref: NT/FNT/532/7/S
M/s. CP Ang & Company,
Advocates & Solicitors,

18, Leboh Kampung Beggali,
12000 Butterworth,
Seberang Perai.

Dear Sir.

Re: Lot 532, Mukim 7, Seberang Perai Selatan

Refer to the letter from M/s. Goik Ah Kim dated on 9 of August 1990 (And a copy of letter from you to M/s. Goik Ah Kim).

Refer to your request for payment (a) & (b), we are fully aware that we did not engage you to do the approval of draft sale & purchase agreement nor any correspondence to M/s. Tan Boon Lim & Company. Further more, we did not issue any option for sales to any broker.

Regarding the application for final title, we are herewith attached a photocopy of payment received to your office for your perusal. Kindly let us know why should we pay for the said fee.

Thank you.

Yours faithfully,
sgd.

c.c.

1. Tan Chiah Hock,
   37A & 37B,
   Jln. Persisiran Perling,
   Taman Perling
   81200 Johor Bharu,
   Johor.

2. Tetuan Goik Ah Kim & Co.,
   No. 1668 (1st Floor), Jalan Atas,
   14300 Nibong Tebal,
   Seberang Perai Selatan.

This was the first intimation in writing by the defence - coming only from the second defendant but not the first defendant - challenging the authority of M/s. CP Ang & Co. to act on their behalf in the matter of the sale and purchase of the land and, it came, after a time lag of some two months from the time the defendants had called at the offices of M/s. CP Ang & Co. and declined to sign the sale and purchase agreement. This inaction and delay on the part of the defendants in such a serious matter as challenging the authority of M/s. CP Ang & Co., was cogent fact, wholly inconsistent with the case for the defendants, bearing in mind that they were not country yokels but seasoned businessmen, and was clearly overlooked by the Judge. Indeed, the defendants had by 26 June 1990 consulted the legal firm of M/s. Goik Ah Kim & Co., who had by a letter of that date addressed to M/s. CP Ang &

Co., as solicitors for the defendants, merely asked for the return of the issue document of title of the land but, significantly, not a word was mentioned about their lack of authority to act for the defendants in the matter of the sale and purchase transaction.

It is also material to note that although it was as early as 13 August 1990 that Ang sent copies of the sale and purchase agreement to M/s. Goik Ah Kim & Co., the latter did not return it to Ang until 12 January 1991, saying that Ang's firm did not have authority to act for the defendants - a time lag of some five months.

In point of fact, the defendants, had consulted M/s. Goik Ah Kim & Co. in the fourth week of June 1990 because, by then, they had found a new purchaser for the land at a considerably higher price and, it was only thereafter - perhaps understandably - that the dispute arose which led to the present litigation. The Judge should have, but did not, ask himself, whether the entry on the scene of a new purchaser at a higher price might have been a factor which caused the defendants to renege on the agreement.

There was another point arising from the defendants having found a new purchaser for the land which went to undermine the credibility of the first defendant. According to the testimony of the first defendant, when he "made the second sale" he had "engaged Mr. Goik" and "was not aware of the first sale transaction" and "therefore he did not suspect any problem". But, the testimony of his brother the second defendant, that prior to consulting Goik, both he and the first defendant had called at Ang's office and obtained a copy of the sale and purchase agreement for purposes of the sale to the plaintiff went to show clearly that the first defendant had already known of "the first sale transaction" when he consulted Goik. It is obvious, therefore, that the first defendant's testimony was tainted by a proven lie and that his credibility when tested on this point must be found wanting, yet the Judge omitted to take this into account when evaluating the oral testimony of the first defendant.

Upon the evidence, the Judge ought to have held that the option holder Tan had the authority of both his brothers, the defendants, to authorise Ang to act for the defendants in the matter of the sale and purchase agreement. Ang said that he saw the option when Tan produced it and instructed him. The scope of Tan's authority was spelt out in the option to sell. Although Tan was not called, the statements attributed to him were the statements in the nature of admissions, implied if not express, of one who was in privity with parties to the suit, to wit, the first and the second defendants, as evidenced by the surrounding circumstances hereinbefore referred to.

It is clear law, that not only admissions made personally by the party, but also admissions by those in privity with the party are admissible, as exceptions to the hearsay rule. The most important examples of those in privity are

predecessors in title, referees, and servants **or agents acting within the scope of their authority.** (See, s. 18(1) Evidence Act, 1950).

Evidence of these admissions was also admissible on the broader ground that if a party to a civil suit says that he does not dispute the truth of a fact the Court will not require the opposite party to prove such fact.

At this point, I must interpolate to add that insofar as proof that Tan was the agent of both the defendants in the matter of the sale of the land was concerned, the case against the second defendant was stronger than that against the first defendant, because of the existence of the option to sell in writing signed by the second defendant but **not** by the first defendant. Indeed, before us, Counsel for the defendants conceded that the appeal should be allowed insofar as the second defendant was concerned though not, of course - so he argued - insofar as the first defendant was concerned.

In my view, however, having regard to the evidence of the surrounding circumstances, hereinbefore mentioned, there was sufficient material, from which it could be inferred that Tan was the duly authorised agent of **both** the defendants for the **purpose** of selling the land, upon the terms stated in the option in writing.

I recognised that it was important to consider the case against each defendant separately not only as regards the general issue of whether the first defendant had incurred contractual liability to sell the land to the plaintiffs but also as regards the issue whether evidence of the statements by Tan to Ang were admissible as against the second defendant only or as against **both** the defendants.

On this latter point of admissibility, the law is clear that out-of-Court admissions by co-parties in legal proceedings are not admissible against a joint party **simply** by virtue of their joinder as parties. In other words, for such evidence to be admissible against a joint party, there must be something more than the mere fact of such joinder. To illustrate, see *Rutherford v. Rutherford* [1923] AC 1 at 10 HL which shows that a respondent may be found to have committed adultery with the co-respondent but the co-respondent is not **thereby** proved to have committed adultery with the respondent.

In the present case, however, as I have already said, I was satisfied, having regard to the evidence of the surrounding circumstances, herein before mentioned, that there was sufficient material from which it could be inferred that Tan was the duly authorised agent not only of the second defendant but also of the first defendant, for the purpose of selling the land upon the terms appearing in the option. Tan was, therefore, in privity with **both** defendants to the suit and, therefore, his out-of-Court statement which were in the nature of admissions, either implied, if not express, were admissible against **both** the defendants.

It follows that the Judge was quite wrong in treating evidence of the statements attributed to Tan, which were implied, if not express admissions, as hearsay and excluding the same from his consideration. Had the Judge not erred in this respect, he would most probably, have arrived at a different decision and, so, on this ground alone, the appeal must he allowed.

But, if I am wrong in the view I take regarding the primary ground of appeal, then there is an alternative ground upon which the appeal must succeed.

Looking back, I would say that generally, the inaction and delay on the part of the defendants to challenge the authority of M/s. CP Ang & Co. to bind them contractually was not merely inconsistent with the defendants' version of the facts and consistent with the plaintiffs' version but was also relevant to show that even if Ang did not have prior authority to bind the defendants contractually, in the matter of the sale and purchase of the land, yet it afforded strong evidence from which an inference of ratification by acquiescence and adoption could be drawn - a point which was overlooked by the Judge. I am supported in this by the following passage in *Halsbury's Laws of England,* 4th Edn., Vol. 1, para 767, p. 458.

> **Ratification by acquiescence**. Although a ratification must be clear and must bear distinct reference to the facts of the particular case, it need not necessarily be proved by positive acts of adoption. In certain cases it is sufficient evidence of ratification that the intended principal, having all material facts brought to his knowledge and knowing that he is being regarded as having accepted the position of principal, takes no steps to disown that character within reasonable time, or adopts no means of asserting his rights at the earliest period possible.

It is settled law that where a solicitor purports without authority, to make a contract, his client can subsequently, ratify it (see Koenigs - *Blatt v. Sweet* [1923] 2 Ch. 314). A ratification of a contract by a principal relates back to the time when it was made by the agent (see *Maclean v. Dunn* [1928] 1 Mod. 761) and a verbal ratification is sufficient. (See *Soames v. Spencer* [1822] 1 Dow & Ry 32.) The burden of proving such ratification lies on the party alleging it, and he must also prove full knowledge of facts. (See *Wall v. Cockerell* [1863] 10 HL Cas. 229 at 243; *Morison v. London County and Westminister Bank Ltd.* [1914] 3 KB 356 CA).

In my view, upon the undisputed evidence, the plaintiffs had discharged this burden, so that even if, contrary to my opinion, Ang did not have prior authority to bind the plaintiffs, contractually, in the matter of the sale and purchase of the land, there was clear evidence from which an inference of ratifiction by acquiescence could be drawn.

Before us, no attempt had been made by Counsel for the defendants to support the decision of the Court below on the ground that even assuming Ang was authorised, (whether previously or by subsequent ratification) to bind the

defendants contractually, no concluded contract was in fact entered into. In my view, Counsel for the defendants was quite correct in not having done so.

For the reasons stated, I was completely convinced that the present appeal came within the range of those cases where, because the Judge had, in arriving at his findings of fact, either overlooked, or failed to take into account or to give proper weight to, material circumstances and the probabilities of the case (see *Khoo Sit Hoh's* case), we are entitled to conclude that he had not taken proper advantage of his having seen and heard the witnesses (per Lord Thankerton in *Watt v. Thomas* [1947] AC 484, at 487-488), with the result that his judgment cannot stand.

In the result, we unanimously held that the appeal should be allowed with costs here, and in the Court below, the judgment of the High Court set aside and that there be substituted, in lieu thereof, judgment for the plaintiffs for specific performance of the agreement of sale and purchase, concerned. The following consequential orders in favour of the plaintiff were also made; namely, that:

(1) upon payment of the full purchase price by the plaintiffs to the defendants or their solicitors, within two months, from the date of order, the defendants do execute a valid and registrable transfer in Form 14A prescribed under s. 215 of the National Land Code, 1965, of the land, free from all encumbrances, and with vacant possession, failing which the Registrar of the High Court Penang be authorised to do so;

(2) the defendants or whosoever has custody or control or possession of the issue document of title of the land, do deposit the same with the plaintiffs' solicitor, within the like period referred to in para (1);

(3) the proper registering authority, upon presentation of the duly executed transfer aforesaid and the issue document of title, do register the same in the manner prescribed by the National Land Code, 1965.

The deposit paid into Court by way of security for the costs of the appeal was ordered to be refunded.

Dato' Mohamed Dzaiddin bin Hj. Abdullah; FCJ and Dato' Hj. Abu Mansor bin Ali, JCA who together with me comprised the Court, have perused this judgment in draft and have asked me to say that they agree with its contents.

Mohamed Dzaiddin Abdullah FCJ:

I have had the advantage of reading the judgment of my brother, Edgar Joseph Jr., and, for reasons stated therein, agree with his conclusion that the appeal should be allowed with costs here and below and further consequential orders stipulated in the aforesaid judgment.

Abu Mansor Ali JCA:

I have had the opportunity of reading the draft judgment of my brother, Tan Sri Dato' Edgar Joseph Jr., FCJ in this matter to which I concur.

Reported by W.A. Sharif

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